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Supreme Court of the United States

October Term, 1975

No. 75-63

CHARLES O. ROSS,
Petitioner,

v.

HONORABLE FRANK REDA,
Judge, Franklin County Municipal Court,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO AFFIRM

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IN THE

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CHARLES O. ROSS,

Petitioner,

v.

HONORABLE FRANK REDA,
Judge, Franklin County Municipal Court,

Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

A. MOTION TO AFFIRM

Pursuant to Rule 16 of this court, respondent-appellee moves the court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

B. REASONS WHY THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

1. Permission for an out-of-state attorney to appear pro hac vice in an action pending in a state court is a privilege, not a right.

2. Before a federal court can hear a habeas corpus claim, petitioner must have exhausted his state remedies.
3. The rulings of a trial court, after reviewing a defendant's motions, are not tainted with bias merely because they are the same in result as those of a previous judge who was removed.
4. Pursuant to Title 28 USC, Section 2254 (b), a United States District Court is bound by a factual finding of a lower state court where such factual finding is relevant to a proceeding in habeas corpus. A United States District Court must apply federal constitutional principles to relevant factual determinations in ruling upon a petition for habeas corpus.

C. STATEMENT OF FACTS

On May 25, 1971, there were many agitating students and outsiders in Linden McKinley High School, a Columbus city school (T.R. 141). There was a complete breakdown of order (T.R. 142), resulting in an emergency situation (T.R. 153). Petitioner-appellant, hereinafter referred to as the petitioner, was in the school during this breakdown of order. In an effort to return order to the school it was decided to order the outsiders to leave the buildings. A principal at the school, Mr. Reed, made an announcement over the public address notifying all outsiders to leave the building and premises (T.R. 148).

After the announcement, the petitioner walked up to James J. Hughes, Jr., the City Safety Director, and stated: "Hughes, you started a riot here," Mr. Hughes, who was working with police and school personnel trying to calm the situation, turned his back to the petitioner and walked over to talk with a Columbus police officer, Major Smith (T.R. 149). The petitioner then

planted himself between Mr. Hughes and Major Smith so that they could not carry on a discussion. At that time, Mr. Hughes turned to Mr. Ross and said to him, "You have been ordered by the principal to leave the school." (T.R. 151). The petitioner then began a long harangue speech concerning his rights and stated he would not leave. At that time, Mr. Hughes told the petitioner, "You know the principal has ordered you out. Now, I'm ordering you out. You are to leave the building or you are going to be arrested for trespassing and failure to depart." (T.R. 151). The petitioner then resumed his speech concerning his rights, ending with the statement, "You can't make me leave." (T.R. 151). Mr. Hughes then stated, "you've got two minutes to get out of here or you're going to be arrested." The petitioner stated that he would not leave and began his speech again. He was removed from the building by two uniformed officers, and in turn transported to the Columbus Police Station.

While at the police station, the petitioner assaulted Richard Dimel while Mr. Dimel was attempting to take the petitioner's fingerprints. The petitioner accomplished this assault by balling up his fist, and stepping back to strike Mr. Dimel. (T.R. 171).

The petitioner was represented by several attorneys during the case. Bruce Campbell and William Boyland who initially appeared on behalf of the petitioner were later joined by Raymond Twohig. William Kunstler, who is not admitted to practice in Ohio, applied to the court for permission to represent the petitioner, which was denied. While in court asking for permission to appear pro hac vice, Mr. Kunstler refused to be seated when instructed to do so by the court. After repeated requests, Mr. Kunstler did sit down, saying he was doing

this not out of any respect for the court, but only because the court had the power to force him to sit down.

After the initial refusal to admit Kunstler by Judge Gervias Fais, Mr. Kunstler made the following statement concerning the refusal at a rally for the petitioner in front of the Columbus City Hall:

> Judge Fais wouldn't let Mr. Ross have a courtroom; he wouldn't let Mr. Ross have a lawyer—You know what I say to Judge Fais, fuck him!

During a hearing on a motion to admit Mr. Kunstler pro hac vice, Mr. Kunstler informed the trial judge, Judge Reda, that:

> "I would never promise Your Honor that I would not speak outside. I will speak outside, because I think to bind me would be unconstitutional and would make attorneys have different First Amendment rights than anybody else. . ."

The trial judge for this case, Judge Frank A. Reda, reviewed all of the motions that had been filed on behalf of petitioner by his attorneys, Campbell, Boyland and Twohig. Judge Reda stated that he concurred with the prior decisions in the case, and therefore, did not disturb them. (T.R. 6).

On the day of trial, the petitioner told Judge Reda that he had discharged Mr. Campbell, Mr. Boyland and Mr. Twohig, and asked that the case be continued. Judge Reda then changed his ruling on the motion filed by the petitioner to be his own counsel in this case; permitting the petitioner to represent himself.

During the trial, Mr. Twohig was in the court room (T.R. 154), conferred with the petitioner at every recess (T.R. 159), and passed notes to the petitioner through the petitioner's wife. Mr. Twohig remained the petitioner's

attorney throughout the trial despite petitioner's initial statement that the attorney had been discharged. Mr. Twohig filed papers for the petitioner in a federal court in Cincinnati (T.R. 178). When asked by Judge Reda during the trial who his attorney was in the federal case, the petitioner replied that Mr. Twohig was representing him (T.R. 180).

After the proceedings in the Franklin County Municipal Court, the case was appealed to the Franklin County Court of Appeals. That court issued a decision that Mr. Kunstler's response to Judge Reda that he would never promise not to speak outside the court room amounted to a refusal on his part to abide by Canon 7 of the Rules of Ethics adopted by the Supreme Court of Ohio. The Court of Appeals affirmed the lower court proceedings.

The case was next appealed to the Ohio Supreme Court. The Supreme Court refused to accept jurisdiction of the case.

The case was then appealed to the United States Supreme Court. The United States Supreme Court refused to grant certiorari in the case, and the case was returned to the Franklin County Municipal Court for execution of the sentence.

Prior to the execution of the sentence a petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of Ohio, Eastern Division. The United States District Court judge denied the petition for a writ of habeas corpus based in part on his acceptance of factual determinations by the state courts which had previously made determinations in this matter.

The Sixth Circuit Court of Appeals affirmed the judgment of the United States District Court.

D. PERMISSION FOR AN OUT-OF-STATE ATTORNEY TO APPEAR PRO HAC VICE IN AN ACTION PENDING IN A STATE COURT IS A PRIVILEGE, NOT A RIGHT.

Petitioner argues that he has a right emanating from the Sixth Amendment to the United States Constitution to be represented by an attorney not admitted to practice in Ohio if that attorney is the representative of his choice. He argues that such a rule is appropriate in his case because he is asserting general constitutional claims which require for their vindication the skills of a "political trial specialist." Petitioner is arguing, in effect, that whenever a federal constitutional claim is asserted which the petitioner wishes to characterize as "political", his choice of counsel must supersede any local interest in regulating the practice of law by out-of-state attorneys.

The petitioner's contention is legally unsound for two reasons. First, no count, either federal or state, has ever interpreted the scope of the right to counsel in state courts this broadly; in fact, the United States Supreme Court has consistently denied certiorari in cases presenting the same question as is raised by petitioner in this matter. Second, the effect of accepting petitioner's argument would be to shift the discretion to limit appearances by out-of-state counsel which is now vested in state courts to the defendants who are being tried in those courts.

The claim of petitioner that his out-of-state attorney was necessary to present his so-called "political" defense is particularly bizarre in view of a motion which was signed by the petitioner requesting that he be permitted to act as his own counsel during the trial because:

"* * *

"3. A critical part of Professor Ross' case is an examination of the political motivations of some

prosecution witnesses in order to establish their lack of credibility.

"4. The direct opposition of those motivations to the political philosophies of Professor Ross was the direct cause of his arrest.

"5. This inquiry into political motives requires that counsel has the fullest and most direct comprehension of Professor Ross' political philosophy, past activities and the reports of these activities.

"6. Attorneys for Professor Ross confess their inability to fully and adequately conduct that inquiry, and represent that Professor Ross is best qualified to do so.

* * *" (Court of Appeals decision—Page 638.)

The foregoing application was signed by Mr. Kunstler, thus representing to the court that Mr. Kunstler was unable to present the delicate political questions that petitioner now claims were involved in the case. During the trial, the trial judge ruled on the motion to permit the petitioner to represent himself during the trial; this ruling was to the effect that petitioner could represent himself during the trial. Significantly, petitioner raised no questions during the trial in any area. Now, petitioner represents to this court that he was unsuited to conduct his defense, and his defense could only have been successfully presented by a so-called "political trial specialist."

Petitioner filled the pages of his brief with many cases having no application to the proposition he presents. Among those cases are the following: In Re Mandell, 69 F 2d 830 (2d Cir. 1934); Powell v. Alabama, 287 US 45 (1932); Glasser v. United States, 315 US 60 (1942); People v. Price, 262 NY 410, 187 N.E. 298 (1933); State v. Long, 19 Ga. App. 82, 166 S. E. 2d 365 (1969); Backer v. Commissioner of Internal Revenue, 275 F 2d 141 (5th Cir. 1960); Reynolds v. Cochran, 363 U.S. 801, and 363 U. S. 824 (1960); misc. orders; Chandler v. Fretag, 348 U.S. 3 (1954); Smith v. United States, 288 F 2d 259

(D.C. Cir. 1923); Walker v. State, 194 Ga. 727, 22 S.E. 2d 462 (1942); People v. Shiffman, 350 Ill. 243, 182 N.E. 760 (1932); Richardson v. State, 288 S.W. 2d 500 (Tex. App. 1956); Kerling v. G. W. VanDusen & Co., 109 Minn. 481, 124 N.W. 235 (1910); Burnham v. Brush, 176 Misc. 29, 26 N.Y.S. 2d 397 (1941); People v. Crovedi, 53 Cal. Rptr. 284, 417 P 2d 868 (1966); Chivers v. State, 5 Ga. App. 654, 63 S.E. 703 (1909). None of these cases raises the question of whether the scope of petitioner's right to counsel includes the right to choose an attorney not authorized to practice in the courts of the state where the defendant is being tried. Thus, these cases do not apply to the question at bar.

Petitioner argues that the case of *United States v. Seale*, 471 F 2d 345 (7th Cir. 1972), should apply here. In that case the defendant was being tried in a federal court. Lead counsel was unavailable because of illness, and the presiding judge ordered the trial to proceed without him. The question of counsel's out-of-district status was never raised in that case. Moreover, the 7th Circuit did not raise defendant's choice of counsel to the level of unequivocal right, but merely stated that it "deserves consideration". 461 F 2d 345, 358.

The broad question of whether states are "entirely free to regulate the practice of law in any way they see fit," is not disputed here. Respondent fully concurs with the authorities petitioner cites in his discussion of this proposition. In Re Stolar, 401 U.S. 23 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); National Association for the Advancement of Colored People v. Button, 371 U.S. 451 (1963).

Some cases cited by petitioner do involve disputes over an appearance by out-of-state counsel; however, these cases are factually and legally distinguishable from the

case at bar. The case of *Lefton v. City of Hattiesburg*, 333 F 2d 280 (5th Cir. 1964), involved the removal of certain civil rights prosecutions from a state court in Mississippi to a federal district court. The court concluded that a local rule requiring that removal petitions be signed by a member of the local bar should be waived, or admission granted pro hac vice, where local counsel could not be obtained. The court's decision turned on the unavailability of local counsel, a problem which was not encountered in the present case. The case of *Sanders v. Russell*, 401 F 2d 241 (5th Cir. 1968), was also a case brought under federal civil rights laws in a federal court. The 5th Circuit in a decision, which relies heavily on their decision in *Lefton*, supra, expressly distinguished their holding in that case from situations like the one presented here:

> The petitioners' position is simply that they have a federal right to retain counsel of their choice who are attorneys in good standing at their respective bars and are associated with locally-admitted counsel in non-fee generating school desegregation cases in federal court. . . . This case does not involve the right to practice in state court. 401 F 2d 241, 244.

The case of *United States v. Bergamo*, 154 F 2d 31 (3rd Cir. 1946), also involved an action in federal court. That court stated that it was not deciding the issue of whether out-of-district counsel may be required to associate a local member of the bar. It seems fair to infer from that language that the court was also not deciding whether defendants in state courts had a right to retain out-of-state counsel. In addition, the *Bergamo* holding was expressly limited to federal courts by the case of *Cooper v. Hutchinson*, 184 F 2d 119, 122 (3rd Cir. 1950).

The case of *Spanos vs. Skouras Theatres Corp.*, 364 F 2d 161 (2d Cir. 1966), cert. denied 385 U.S. 987 (1966), was a civil suit instituted in federal court by an out-of-state attorney against a client for whom he had rendered his services over a period of five years as an anti-trust specialist. This case, which was decided under the privileges and immunities clause and *not* the Sixth Amendment, held that a contract for the out-of-state attorney's services was not unenforceable as an illegal bargain. Because the court tied its holding to the assertion of a federal claim, petitioner contends that a right to retain out-of-state counsel exists whenever a federal claim is asserted. This interpretation has been criticized:

> "So applied the court's decision could be utilized to invalidate any state rule of practice, the enforcement of which might hinder or prevent the vindication of a federally created right. With no narrower criterion than the 'necessary and appropriate' standard of Spanos, statutes of limitations, local pleading and discovery rules, or requirements of security for costs, could fall whenever a federal cause of action is asserted." Note, Retaining Out-of-State Counsel: The Evolution of a Federal Right, 67 Colum. L. Rev. 731, 744 (1967).

Cooper v. Hutchinson, supra, deals with out-of-state counsel in a state court. *Cooper* was a capital case where out-of-state counsel was granted admission pro hac vice, participated at length in the proceedings, and then was dismissed without cause. The court clearly recognized that the initial decision to admit an out-of-state attorney is "to be in the sound discretion of the court", but held that once he is so admitted, he cannot be disqualified from that particular case, except upon a showing of substantial cause. 184 F 2d 119, 723. Petitioner asserts that his representation by Mr. Kunstler in sev-

eral previous proceedings justified applying the *Cooper* holding to this case. Such an interpretation is illogical because it was the initial decision to admit counsel and his familiarity with the particular case which triggered defendant's Sixth Amendment right in *Cooper*. Moreover, the *Cooper* court described as "startling" the suggestion that the courts of the states are bound to permit out-of-state attorneys to practice before them. 184 F 2d 119, 122.

Numerous authorities have held that permission to retain an attorney not admitted to practice in a jurisdiction is not a right but a privilege.

> It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge. *Thomas v. Cassidy*, 249 F 2d 91, 92 (4th Cir. 1957), cert. denied 355 U.S. 958 (1958).

The court in *Thomas*, which felt the question merited no more than a per curiam opinion, expressed "grave doubt" as to whether denial of the privilege to appear pro hac vice was even reviewable. See People of the State of New York v. Epton, 248 F. Supp. 276 (S.D.N.Y. 1965); Parker v. Parker, 97 So. 2d 136 (Dist. Ct. App. Fla. 1957).

The Supreme Court of the United States has never dealt with the specific question presented here except to deny certiorari, but has recognized that the control of the practice of law is vested in the courts of each jurisdiction. *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961). Relying partly upon the *Cohen* decision, the Supreme Court of New Jersey decided a question virtually identical to

the case at bar. That court held that no constitutional right to select an attorney who was not a member of the New Jersey bar exists as long as there is a member of the local bar who is "able, willing and free to provide effective counsel". *State v. Kavanaugh,* 52 N.J. 7, 18, 243 A. 2d 225 (1968), cert. denied 393 U.S. 924 (1968).

The question of representation by an out-of-state attorney in a state court as being subject to the discretion of the bar of that state has been raised before the Supreme Court of the United States in the past, and the court has consistently refused to hear such cases. Consistent with the foregoing, when the instant case appeared before the United States Supreme Court, the United States Supreme Court refused to grant certiorari.

E. BEFORE A FEDERAL COURT CAN HEAR A HABEAS CORPUS CLAIM, PETITIONER MUST HAVE EXHAUSTED HIS STATE REMEDIES.

One page 4. of his petition for writ of certiorari, petitioner in his questions presented for review raises two questions not heretofore raised at any level in his appeals. Questions 2. and 3. present new and novel arguments that were definitely not raised in state court proceedings in the prior appeals from the Ohio Court of Appeals and the Ohio Supreme Court which subsequently reached this court in a prior case, which was Case No. A-554.

28 USC, Section 2254 (1973), provides in relevant part:

> 2254. State custody-Remedies in Federal courts-(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody of

violation of the Constitution or laws or treaties of the United States.

(b) *An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State,* or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(Emphasis Added.) Accordingly, the case law has unanimously held that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity of the state courts to correct a constitutional violation." *Darr v. Buford,* 339 U.S. 200, 204 (1950) [overruled in other respects, *Fay v. Doia,* 372 U.S. 391, 435-36 (1963)]. *See also, Nelson v. George,* 399 U.S. 224, 229 (1970); *Irvin v. Dowd,* 359 U.S. 394, 404-05, (1959); *Dombrowski v. Johnson,* 488 F. 2d 68 (6th Cir. 1973); *Albertson v. Johnson,* 440 F. 2d 1201 (6th Cir 1971). Indeed §2254 merely reflects a policy of federal-state comity. *See Fay v. Doia, supra,* 372 U.S. at 419-20.

In relation to the present case, the exhaustion requirement means not only that petitioner must have attempted vindication of some claims relating to his conviction in state court, but that the precise claims presented on habeas corpus have been passed upon by a state appellate body. This is the precise conclusion of the Supreme Court

in the 8-1 holding of *Picard v. Connor*, 404 U.S. 270 (1971).

In *Picard*, a state prisoner sought reversal of his conviction in state court on the ground that the procedures used to amend the indictment by which he was prosecuted were not in compliance with state law. Moreover, on federal habeas corpus, petitioner appended the new argument that such procedure also denied him equal protection of the laws under the fourteenth amendment. The Supreme Court held that he had not exhausted his state remedies because the state court had not had an opportunity to hear the federal claim:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," Ex parte Royall, supra, at 251, 29 L Ed 871, *it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts.* Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. According, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See Darr v Burford, supra, at 203, 94 L Ed at 766; Davis v Burke, 179 US 399, 401-403, 45 L Ed 249, 250, 251, 21 S Ct 210 (1900).
>
> * * * *
>
> We are thus unable to agree with that court that respondent provided the Massachusetts "court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.' " 434 F2d, at 674. *To be sure, respondent presented all*

> *the facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts.* The Supreme Judicial Court dealt with the arguments respondent offered; *we cannot fault that court for failing also to consider sua sponte* whether the indictment procedure denied respondent equal protection of the laws.

404 U.S. at 275-77. (emphasis added).

Conceivably, the present situation presents a much stronger basis for the application of this rule, for in *Picard* the petitioner, at the state level, *did* make a claim that at least "resembled" the equal protection grounds sought on habeas corpus. Mr. Justice Doublas, in his dissent, stressed this particular factor:

> He raised in his brief before the Supreme Judicial Court of Massachusetts his claim that such a substitution denied him that quantum of due process required by the Fourteenth Amendment "in that he was put to trial without having been indicted by a Grand Jury." He did not refer to the Equal Protection Clause which is also a part of the Fourteenth Amendment. But that is a nicety irrelevant to the maintenance.

404 U.S. at 278-79. With the conclusion of *Picard* standing in the face of this objection so must it stand in the present circumstances.

Picard has not been overruled. While the Supreme Court in the past few years has not sought to re-establish its standards [that is, it has been cited only a few times in passing reference], the opinion has not been criticized by either the Court or any of the court of appeals. To the contrary, the circuit courts have faithfully obeyed its mandates without reservation. *See e.g., Nelson v. Moore*, 470 F.2d 1192, 1197 (1st Cir. 1972); *United States v.*

Zelker, 496 F.2d 991 (2nd Cir. 1974); *United States ex rel Hayward v. Johnson;* 508 F.2d 322, 330 (3rd Cir. 1975); *Saunders v. Cox*, 470 F.2d 734, 736 (4th Cir. 1972); *Minaffe v. Estelle*, 491 F.2d 1096 (5th Cir. 1974); *Macon v. Lask*, 458 F.2d 942, 948 (7th Cir. 1972); *Smith v. Wolff*, 506 F.2d 556, 558 (8th Cir. 1974), *Williams v. Hocker*, 463 F.2d 234, 235 (9th Cir. 1972); *Ramirez v. Rodriguez*, 467 F.2d 822, 823 (10th Cir. 1972).

F. THE RULINGS OF A TRIAL COURT, AFTER REVIEWING A DEFENDANT'S MOTIONS, ARE NOT TAINTED WITH BIAS MERELY BECAUSE THEY ARE THE SAME IN RESULT AS THOSE OF A PREVIOUS JUDGE WHO WAS REMOVED.

Petitioner argues that the taint of bias, imputed from the previously disqualified judge, must attach to the rulings of the trial judge in this case. He alleges that the record reveals a "hesitancy" on the part of the trial judge to "secondguess" the chief judge of his court. Furthermore, he argues that because Judge Reda's rulings were the same in result as rulings made by Judge Fais who was removed, they must be erroneous.

The case of *Tumey v. Ohio*, 273 U.S. 510 (1927), involved a trial in a mayor's court where the mayor only received remuneration when he convicted. The Supreme Court concluded that such a financial interest violates the due process rights of the defendant. Petitioner argues that *Tumey* and cases decided in similar situations should apply here. Clearly they do not. Judge Reda is an independently elected official, with a fixed salary, answerable only to the citizens of the community. The showing of "hesitancy" which petitioner infers from the record does not begin to approach the inherent bias of a pecuniary interest. Moreover, petitioner's insinuation of bias by association because Judge Fais is the chief judge of the court on which Judge Reda sits, must be rejected as a highly inappropriate assertion.

Petitioner relies heavily upon the probability that Judge Reda could not have fully considered all the motions presented to him during the time in which he reached his decisions. This probability combined with Judge Reda's statement that he concurred with the rulings of Judge Fais is sufficient cause for reversal of those rulings according to petitioner.

Speculation as to the mental processes of a trial judge has never been the standard applied when reviewing his rulings for error. The only workable standard to apply here is whether the rulings are clearly erroneous. Petitioner, except for two of the rulings, does not dispute them as matters of law. The two rulings which petitioner does dispute were appealed and argued at length in the Court of Appeals of Franklin County, Ohio, and are further argued in this brief. They were clearly not erroneous.

The arguments which petitioner advances to illustrate that Judge Reda's rulings are tainted with bias are based upon inference and conjecture. As such, their status as a showing of a violation of petitioner's due process rights is dubious at best.

G. PURSUANT TO TITLE 28 USC, Section 2254 (d), THE UNITED STATES DISTRICT COURT IS BOUND BY A FACTUAL FINDING OF A LOWER STATE COURT WHERE SUCH A FACTUAL FINDING IS RELEVANT TO A PROCEEDING IN HABEAS CORPUS. THE UNITED STATES DISTRICT COURT MUST APPLY FEDERAL CONSTITUTIONAL PRINCIPLES TO RELEVANT FACTUAL DETERMINATIONS IN RULING UPON A PETITION FOR HABEAS CORPUS.

In this case the federal district court judge did accept a factual determination by a lower state court; the judge then applied federal constitutional principles to this

factual determination, and then made its ruling on the petition for habeas corpus. Therefore, no error was committed by the United States District Court judge in this proceeding.

The instant case is very similar to the case of *Matthews v. Wingo* (1973 CA6 Ky), 474 F2d 1266, cert. den. 411 US 985, 36 LE2d 963, 93 SCt 2283, where this court approved a district court's acceptance of a state court's adjudication of the petitioner's competency.

The following facts were relied upon by the United States District Court in the prior habeas corpus proceeding that is now before this court. During a proceeding in the Franklin County Municipal Court on July 10, 1972, Judge Reda, a Franklin County Municipal Court judge, questioned Mr. Kunstler:

> I am concerned about your conduct outside the court room. I have never met you before, Mr. Kunstler, but I had reports about your conduct. Not only in this jurisdiction but also in other jurisdictions outside the court room.
>
> Now, do you have any statements that you would like to make to the court with respect to what you believe an attorney's conduct should be outside the court room?

Mr. Kunstler responded, in relevant part:

> Surely, Your Honor, I would be glad to. Outside of the court room I have every right to all the First Amendment privileges of any other person. [Mr. Kunstler then referred to *Chase v Robeson*, 435 F2d 1059 (7th Cir. 1970)] . . . They said in that case that unless you can show by an evidentiary hearing that there is a clear and present danger to the administration of justice, no court can bind a lawyer or his client from speaking in a criminal matter extrajudicial statements. This is the standard which I

> have now adopted for myself. I think it's the law of the land, and I think it's clear . . . So I would never promise Your Honor that I would not speak outside. I will speak outside, because I think to bind me would be unconstitutional and would make attorneys have different First Amendment rights than anybody else . . .

The above statement by Mr. Kunstler certainly fits within criteria set out in *Brown vs. Allen,* 344 US 443, at page 506, where the court stated:

> " 'By issues of fact' we mean to refer to what are termed basic, primary or historical facts; facts 'in the sense of a recital of external events and the credibility of their narrators' ".

The foregoing statement by Mr. Kunstler formed the background of facts which lead to the conclusion by the Court of Appeals of Franklin County, Ohio, that Mr. Kunstler would not comply with Canon 7 of the Code of Professional Responsibility as adopted by the Supreme Court of Ohio. Canon 7 in pertinent part reads as follows:

> "A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards of permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

The disciplinary rules specifically deal with the question of trial publicity and DR 7-107 (B) provides as follows:

> "A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
>
> (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
>
> (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
>
> (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
>
> (5) The identity, testimony, or credibility of a prospective witness.
>
> (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

DR 7-107 (B) does not preclude a lawyer during such period from announcing:

> (1) The name, age, residence, occupation, and family status of the accused.
>
> (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
>
> (3) A request for assistance in obtaining evidence.
>
> (4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him."

DR 7-107 (D) deals specifically with out-of-court statements during trial, and provides as follows:

> "During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case."

Based on the statement of Mr. Kunstler and upon an analysis of Canon 7, 'the Court of Appeals of Franklin County, Ohio, made the following ruling:

> From Mr. Kunstler's statement, the trial court was justified in conclusing that Mr. Kunstler would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with re-

> spect to out-of-court statements but, rather, would only comply with the lesser standard of *Chase* [*v. Robeson*, 435 F 2d 1059 (7th Cir. 1970)] as he interpreted that standard to be. We find Canon 7 of the Code of Professional Responsibility, as recommended by the American Bar Association and adopted by the Supreme Court of Ohio, to be a constitutionally valid regulation of the conduct of attorneys with respect to out-of-court statements concerning pending litigation. In fact, such canon would seem to be required by *Sheppard v. Maxwell*, (1966) 384 US 333 . . .

The factual statement made by Mr. Kunstler at the municipal court hearing amply supports the finding of the Court of Appeals of Franklin County. In ruling upon the petition for a writ of habeas corpus the United States district judge ruled that the record of the case supported the conclusion that Mr. Kunstler would not comply with Canon 7. The district court judge followed this finding by a recital of pertinent federal cases dealing with right to counsel and in page 11. of its decision made the following finding:

> "The assertion that a trial court has the unreviewable discretion to refuse to admit, *pro hac vice*, a criminal defendant's otherwise fully qualified counsel on the sole ground that he is not a member of the bar of the court's jurisdiction is untenable . . . "

It is apparent from the ruling of the United States District Court that he followed all procedures in a proper manner in making the foregoing ruling. He was bound to accept factual conclusions from lower state courts. He did this. He was further bound to apply federal constitutional standards to these factual determinations. He did this. Therefore, it is respectfully submitted that petitioner-appellant's first claim of error is not well taken.

CONCLUSION

Respondent respectfully submits that this court should affirm the judgment of the United States Court of Appeals for the Sixth Circuit, on the ground that it is manifested that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

With the exception of the two new issues raised by the petitioner in his petition, this total matter amounts simply to a review for a second time by this court of precisely the same issues raised by petitioner in his appeal during the October Term of 1973 in Case No. A-554. The court at that time declined to hear this case and no differences in persuasion have been offered as to why this court should not again decline to hear this case.

Respondent respectfully submits that the judgment of the Sixth Circuit, Court of Appeals, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Affirm was duly mailed, postage prepaid, to the following attorneys for petitioner, this 2 day of September , 1975:

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APPENDIX

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN
SS

Lieutenant Thomas A. Waters, being first duly sworn, deposes and says that on the 23rd day of April, 1972, at approximately 8:00 p.m., affiant was present at a rally being held for defendant Charles Ross at the steps of the Columbus City Hall, in the City of Columbus, County of Franklin, State of Ohio; Affiant further says that attorney William M. Kunstler made the following statement to a crowd of approximately 1,000 persons:

> Judge Fais wouldn't let Mr. Ross have a courtroom; he wouldn't let Mr. Ross have a lawyer; . . . You know what I say to Judge Fais, fuck him!

THOMAS A. WATERS

Sworn to and subscribed before me this 13th day of June, 1973.

CARL T. WOLFROM
Notary Public
for the State of Ohio